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TAXATION OF THINGS IN TRANSIT. I.*

IT IS widely assumed that a State has no jurisdiction to tax things in transit or things only temporarily within its borders. Courts often say so.[1] Yet exemptions claimed on one or the other of these grounds have frequently been denied. Sometimes both grounds together fail to afford immunity. The decisions of the Supreme Court of the United States leave us somewhat in the dark as to the extent of the supposed general principle and the constitutional basis for such standing as it has. In all the cases that have come before it, the only transit that foiled the taxgatherer has been interstate transit, and the only temporary presence that has clearly conferred immunity has been temporary presence during the course of interstate transit. From this it might be inferred that such exemptions as the Supreme Court has granted have been due entirely to

*EDITORIAL NOTE: This is the first of a series of articles on this subject by the author to appear in the VIRGINIA LAW REVIEW.

[1] For a review of State decisions see Joseph H. Beale, "The Situs of Things", 28 YALE LAW JOURN. 525 (April, 1919). The present article is confined mainly to a consideration of Supreme Court decisions. Professor Beale considers the subject somewhat in "Jurisdiction To Tax", 32 HARV. LAW REV. 587 (April, 1919). On page 598 he says:

> "Not every chattel which happens to be within the limits of the sovereign's territory can be regarded as *situated* there. A chattel merely temporarily within those limits is not, at common law, subject to the ordinary property tax, nor can one of the United States by statute subject such a chattel to taxation, since to do so would contravene due process of law. . . .
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> The reason is clear. The tax is levied in return for a year's protection; it is known that the particular chattel will require protection only for a short time. To exact a tax based on a year's protection would be unfair; no other tax is provided for by the law. If there were provision for a daily tax this could lawfully be levied even from property temporarily within the state, for such property is of course within the jurisdiction of the sovereign. Any method provided by statute for exacting a really fair tax from such property is constitutional."

the commerce clause and not to any theory of *situs* or of general jurisdiction to tax. Yet the inference is open to suspicion when we find that in some of the crucial cases the unsuccessful claim to exemption was predicated solely on the commerce clause with no reliance on the Fourteenth Amendment. Moreover, interstate transit and partial or complete absence from the jurisdiction have not been sufficient to exempt property from taxation at the domicil of its owner when the absence of the property was not of the kind to entitle the owner to the shelter of the Fourteenth Amendment. Furthermore, not a few of the Supreme Court opinions speak the language of *situs,* extraterritoriality and general notions of jurisdiction to tax, even in cases formally decided under the commerce clause.

This is enough to inspire doubts as to the basic theory of the Supreme Court decisions. A review of the opinions will tempt one to suspect that the court has not stuck consistently to a single conception. After such a review we may be able to point to the conception or conceptions that ought to be entertained, even if we cannot surely know how far the Supreme Court agrees with us. Plainly enough, issues of extraterritoriality underlie most, if not all, of the controversies presented for adjudication. Property in the course of interstate transit is necessarily present only temporarily in any single jurisdiction. If presence on tax day is enough to give jurisdiction to tax for an entire year, there is extraterritorial taxation according to the canons of economics though not perhaps by the principles of physics. Whether physics or economics should prevail is not to be answered offhand. The wise answer may depend on circumstances which vary from case to case. This can best be considered after the cases have been presented. In reviewing them, it is well to bear in mind certain distinctions. We should observe whether the tax in question is levied at the domicil of the owner or elsewhere, whether the transit or the temporary presence is in the jurisdiction where the journey begins, or where it ends, or in some intermediate place, and whether the property indulging in interstate travel is a vehicle or its cargo. It seems from the cases that these various elements in the situation sometimes make a dif-

ference. Attention must be given also to the circumstances under which a succession of specific temporary presences justifies a conception of an average permanent presence. The cases which entertain this conception afford the best ground for believing that the exemptions given to property in transit are influenced less by the fact that it is in motion than that its presence is ephemeral.

I.

The first case to exempt property in transit is Hays *v.* Pacific Mail S. S. Co.,[2] in 1855, eleven years before the advent of the Fourteenth Amendment. Ships owned by a New York corporation touched at San Francisco for a day or so at a time and put in at another California port for some ten or twelve days at a time for repairs and refitting. They were taxed by California and the tax was paid under protest. Suit to recover back the amount paid was begun in the federal district court. As it was not until 1875 that a suit could be started in or removed to a lower federal court on the ground that it involved a right, title or interest under the federal Constitution, the original jurisdiction must have been obtained by diversity of citizenship. The brief of the attorneys for the company adduced the commerce clause and some congressional acts with regard to enrollment and registration of vessels. It urged also that the tax was one on imports and one on tonnage. The opinion of Mr. Justice Nelson refers to the Constitution only in a roundabout way and throws no light on the court's attitude towards the specific constitutional complaints of the company.

The learned Justice remarks that the length of the stops made by the ships in the several ports at which they touch "is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, etc., which in no respect can affect the question as to the *situs* of the property, in view of the right of taxation by the State."[3] Such visits by a ship at one port or at several "furnish no more evidence that she has become a part of the personal property within the State, and liable to taxation at

[2] (1855) 17 How. (58 U. S.) 596.

[3] *Ibid.*, 599.

one port than at the others." [4] The idea that *situs* depends either on domicil of the owner or on permanent presence of property is implied by the succeeding statement that "she is within the jurisdiction of all or any one of them temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State, or changing her home port." [5] The conclusion of the court is put as follows:

> "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation, they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at their home port, where the vessels belonged, and where their owners were liable to be taxed for the capital invested, and where the taxes had been paid." [6]

Mr. Justice Campbell evidently feared that this declaration might later be construed more broadly than he thought fit, for he wrote a brief opinion in which he said that he concurred "only in consequence of the facts stated in the declaration, and admitted by the demurrer." [7] He added that the "material fact is, that the vessels were *in transitu,* having no *situs* in California, nor permanent connections with its internal commerce." [8]

It is plain that the court had no notion that the ships were exempt from taxation because used as instruments of interstate commerce. It was recognized that they were taxable where they had their *situs.* The basis of the decision must therefore be that temporary presence is not enough to establish a *situs* for property away from its owner's domicil. In so far as the court hints at practical reasons, it points to the possibility of multiple taxation if temporary presence is enough to confer jurisdiction. It contents itself with this, without going on to mention that such multiple taxation would interfere with the course of interstate trade. Yet, according to sound canons of

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[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*, 599-600.
[7] *Ibid.*, 600.
[8] *Ibid.*

judicial action, the Supreme Court could upset the action of the California authorities only if that action violated the law or constitution of California or the Constitution of the United States. Mr. Justice Nelson did not refer to the California constitution. Technically, his opinion must be taken as an interpretation and application of the commerce clause; yet everything he said would be equally applicable to property temporarily present on other errands than an interstate journey. The fact that the vessel was engaged in commerce seems to be referred to chiefly as evidence that it would make only a brief visit. The substantial principle of the case is therefore that the taxation of things present only temporarily is one form of the vice of extraterritoriality. This analysis of the decision is not shaken by the fact that at this time State taxation could violate the federal Constitution only to the extent that it impaired the obligation of a contract or interfered with the freedom of interstate or foreign commerce. There is a plain distinction between the considerations which create a federal question and the considerations which determine the specific answers to such questions.[9]

It is, however, far from certain that in 1855 the Supreme Court was duly aware that it must put its finger on some clause in the federal Constitution before annulling State taxation for the vice of extraterritoriality. There is evidence that it felt free to take such action with no other warrant than its own views of the proper principles of conflict of laws—at least when the question was presented in a case originating in the federal courts. It may be that Mr. Justice Campbell's unwillingness to join in Mr. Justice Nelson's opinion in the Hays Case was due to some apprehension that the Supreme

[9] For example, the full-faith-and-credit clause makes constitutional issues out of questions of *res adjudicata* and the jurisdiction of courts over defendants. Questions of the latter character arise also under the due-process clause. The constitutional clause is often only the lever by which the Supreme Court gets hold of ordinary common law questions. The Supreme Court needs a constitutional issue to get jurisdiction to answer the question; but once jurisdiction is obtained the Supreme Court reaches its answer in the light of its conception of what the common law ought to be.

Court was prepared to arrogate to itself untrammelled power to pass on all complaints that a State has exceeded its jurisdiction. That such an apprehension was not baseless is evident from the later course of Supreme Court doctrine. In 1871, St. Louis *v.* Wiggins Ferry Co.[10] held that Missouri could not tax the ferry boats of an Illinois corporation, which had their home port in Illinois, were taxed there, and touched Missouri for not more than ten minutes a trip. Suit to collect the tax was started in the Missouri court and removed before trial to the federal circuit court by the non-resident corporate defendant. The case was decided wholly on the issue of *situs*. Mr. Justice Swayne does not mention the commerce clause. He notes that it has been argued on behalf of the company that "the taxes in question are taxes upon the tonnage of vessels engaged in interstate commerce, and are prohibited by the Constitution of the United States." [11] But of this he says: "No argument as to this aspect of the case has been submitted by counsel upon the other side. We have not found it necessary to consider the subject, and we express no opinion upon it." [12] The opinion that he did express is this:

> "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action." [13]

As a matter of judicial psychology, this pretty plainly indicates a readiness on the part of the Supreme Court, when dealing with questions of State jurisdiction to tax, to act on the basis of general principles of jurisdiction and without any constitutional clause to rely on. No such assumption of authority was actually exercised in the case, since the decision was put

[10] (1871) 11 Wall. (78 U. S.) 423. [11] *Ibid.*, 432.
[12] *Ibid.* [13] *Ibid.*, 430.

upon the ground that the boats were not "within the city" under the proper interpretation of the statute. But this interpretation discloses no effort to discover what the lawmakers intended. It is frankly based on the limits of the lawmaking power. Mr. Justice Swayne observes that the boats "did not so abide within the city as to become incorporated with and form part of its personal property",[14] and concludes: "Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained." [15] For this he cites Northern Central R. Co. *v.* Jackson,[16] which two years earlier had forbidden Pennsylvania

[14] *Ibid.*, 432. [15] *Ibid.*

[16] (1869) 7 Wall. (74 U. S.) 262. Justices Clifford and Swayne dissented. This case is the forerunner of State Tax on Foreign-held Bonds (1873), 15 Wall. (82 U. S.) 300, in which the former case was approved but put on a different ground. Mr. Justice Field thought that the Pennsylvania tax was bad, not because the property mortgaged to secure the bonds was outside of Pennsylvania but because the bonds were owned by a non-resident of Pennsylvania. In discussing the earlier case he said:

> "If the entire road upon which the mortgage was given had been in another state, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that state. It was the fact that the bonds were held by a non-resident which justified the language used, that to permit a deduction from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the state is not a subject upon which her taxing power can be legitimately levied. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.
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> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects." (15 Wall., at page 319.)

The constitutional clause to which the decision was specifically related was the obligation-of-contracts clause, the theory being that the contract between the borrower and the lender was impaired by a later statute requiring the borrower to deduct the tax from the interest promised to the lender. The doctrine would now be annexed to the Fourteenth Amendment and applied where no contract was affected retroactively. In Buck *v.* Beach (1907), 206 U. S. 392, 27 Sup. Ct. 712, which held it a denial of due process to tax promissory notes held by an agent for a brief time within the State, Mr. Justice Peckham said: "Although the language of

to tax bonds owned by non-residents and secured by property in Maryland, without giving any other reason than that this was taxing property and interests beyond Pennsylvania's jurisdiction. In this case the commerce clause was not applicable. Its citation in the Ferry Case shows that the Supreme Court was there declaring a general principle of jurisdiction to tax and not a special limitation imposed by the commerce clause on an exercise of State power over property within its general taxing power.

This is reinforced by Mr. Justice Hunt's opinion in Morgan *v.* Parham,[17] two years after the Ferry Case. Alabama tried to tax boats owned in New York and plying regularly on the Mississippi River between Mobile and New Orleans. The collector seized the boats for non-payment of the tax and the owner brought trespass in the lower federal court. The circuit court gave judgment for the collector, which was reversed by the Supreme Court. The owner relied on the commerce clause; and interference with interstate commerce was one of the grounds of the decision—perhaps the only formal, technical ground. But the opinion made clear that temporary physical presence does not give jurisdiction to tax, and that employment in interstate commerce does not of itself confer exemption. Mr. Justice Hunt does not seem to be thinking exclusively of interstate travel when he says:

> "The fact that the vessel was physically within the limits of the city, at the time the tax was levied, does not decide the question. Thus, if a traveler on that day had been passing through the city of Mobile in his private carriage, or an emigrant with his worldly goods on a wagon, it is not contended that the property of either of these persons would be subject to taxation as property within the city. It is conceded by the respective counsel that it would not have been." [18]

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the opinion in the case of State Tax on Foreign-held Bonds, *supra*, has been somewhat restricted so far as regards the character of the interest of the mortgagee in the land mortgaged . . ., the principle upon which the case itself was decided has not been otherwise shaken by the later cases." (206 U. S., at page 408.)

[17] (1873) 16 Wall. (83 U. S.) 471. [18] *Ibid.*, 474-475.

Nor is the learned Justice confining himself to taxation at the domicil of the owner when he adds:

> "On the other hand, this vessel, although a vehicle of commerce, was not exempt from taxation on that score. A steamboat or a postcoach engaged in a local business within a state may be subject to local taxation, although it carry the mail of the United States. The commerce between the states may not be interfered with by taxation or other interruption, but its instruments and vehicles may be. Gibbons *v.* Ogden, 9 Wheat. 1; Passenger Cases, 7 How. 283. It is not, therefore, upon this principle that we are to decide the case. . . . In the instance before us the tax was upon a vessel at the wharf. It was in this respect as if a tax had been laid upon lumber or cotton lying at the dock at Mobile." [19]

This last sentence shows that in the mind of the court the decision does not rest upon the fact that the property taxed was a vehicle used in interstate commerce in substantial transit at the time the tax was levied. It illustrates our point that a question may arise and be decided under the commerce clause and yet depend upon principles not confined to the commerce clause. In two other paragraphs of the opinion Mr. Justice Hunt puts first the conception that no *situs* is conferred by temporary presence:

> "It is the opinion of the court that the state of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that state, but was there temporarily only, and that it was engaged in lawful commerce between the states with its *situs* at the home port of New York, where it belonged and where its owner was liable to be taxed for its value. . . .[20]

> "The jurisdiction of this court over the present case, as in the case of Hays *v.* Steamship Co., *supra,* arises from the facts: first, that the property had not become blended with the business and commerce of Alabama, but remained legally of and as in New York; and second, that the vessel was lawfully engaged in the interstate trade, over the public waters." [21]

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[19] *Ibid.*, 475.

[20] *Ibid.*, 476-477.

[21] *Ibid.*, 478-479.

From this it seems clear that the Supreme Court at this time was of opinion that a State has no jurisdiction to tax chattels only temporarily present, quite aside from any special immunity conferred by the commerce clause. It is likely, also, that the court thought itself competent, in cases originating in the federal courts, to annul extraterritorial taxation with no other aid than general principles of jurisdiction of which somehow it was the guardian and interpreter. The three cases just considered were decided after the Fourteenth Amendment was part of the Constitution, but before the Slaughter House Cases,[22] in which the Supreme Court first considered its scope and effect. There is no hint in the opinions of Mr. Justice Swayne and Mr. Justice Hunt that they were using or needed to use the Fourteenth Amendment to save property from being taxed elsewhere than at its proper *situs*. Taxation without jurisdiction seemed to them as inherently vicious as taxation without representation had seemed to their grandfathers and was to seem later to some of their granddaughters. Their attitude towards their own authority in the premises may be gathered from a statement of Mr. Justice Miller made two years after the Slaughter House Cases.[23] In Loan Association *v.* Topeka,[24] which held a tax void because not for a public purpose, he said:

> "There are limitations on such power which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." [25]

Mr. Justice Clifford, in dissenting, protested that "there is no power vested in the circuit court, nor in this court, to determine that any law passed by a State legislature is void, if it is not repugnant to their own Constitution nor the Constitution of the United States." [26] But the majority were content to rest the doctrine of no taxation for a private purpose on the essential nature of government. The same broad foundation

[22] (1873) 16 Wall. (83 U. S.) 36.
[23] Note 22, *supra*.
[24] (1875) 20 Wall. (87 U. S.) 655.
[25] *Ibid.*, 662.
[26] *Ibid.*, 670.

apparently seemed sufficient to most of the judges for the doctrine of no taxation without jurisdiction. The philosophical and political error of their ways has been abandoned by their successors, and both doctrines are now applied as interpretations of the Fourteenth Amendment.[27] What is important for us in the course of the doctrinal development is this. The basic objection to the taxes on visiting ships was that their temporary presence did not give them a *situs* and that therefore the State had no jurisdiction to tax them. Taxation without jurisdiction was so manifestly monstrous that it did not much matter what clause, or whether any clause, of the federal Constitution was brought forward to thwart it. This is to be borne in mind in considering cases rested on the commerce clause or on the obligation-of-contracts clause. If the real vice is some form of extraterritorial taxation, we have reason to insist that this vice is equally obnoxious when no contract or interstate commerce is involved.

II.

Now we come to cases that seek to shake our faith in the idea that temporary presence is insufficient to give jurisdiction to tax. *Situs* seems to be acqured by temporary presence, provided the property is not regarded as still in the course of interstate transit. What exempts is interstate transit and not transit alone or temporary presence alone. Since 1873 only two Supreme Court decisions have exempted property whose presence in the jurisdiction was temporary, and in both of these cases the property was in the course of what was regarded as continuous interstate transit.

To these perhaps should be added Coe *v.* Errol,[28] which expressed approval of the ruling of the New Hampshire court, not appealed from, that logs being floated down a river on a

[27] As to the necessity of a public purpose, see Jones *v.* Portland (1917), 245 U. S. 217, 38 Sup. Ct. 112; Green *v.* Frazier (1920), 252 U. S. ——, 40 Sup. Ct. 499. As to the prerequisite of jurisdiction, see Union Refrigerator Transit Co. *v.* Kentucky (1905), 199 U. S. 194, 26 Sup. Ct. 36; Buck *v.* Beach (1907), 206 U. S. 392, 27 Sup. Ct. 712; and other cases considered later in this series of articles.

[28] (1886) 116 U. S. 517, 6 Sup. Ct. 475.

journey between two Maine points through New Hampshire were not taxable in New Hampshire "although detained for a time within the State by low water or other causes of delay." [29] "Such goods", remarked Mr. Justice Bradley, "are already in the course of commercial transportation and are clearly under the protection of the Constitution." [30] Mention may be made also of Gloucester Ferry Co. *v.* Pennsylvania,[31] which pointed out that the ferry boats of a New Jersey corporation could not be taxed by Pennsylvania, where they touched only to land passengers. The tax here involved was on the capital of corporations doing business in Pennsylvania and the decision was that this could not be imposed on a foreign corporation whose business was exclusively interstate transportation.

Of the two cases which squarely exempted property in the course of transit, Ayer & Lord Tie Co. *v.* Kentucky [32] is not important, for the claim of the State was based wholly on the fact that the ship in question was enrolled in Kentucky. Mr. Justice White declared that "enrollment is irrelevant to the question of taxation, because the power of taxation of vessels depends either upon the actual domicil of the owner or the permanent *situs* of the property within the taxing jurisdiction." [33] This seems to imply that what might be called temporary *situs* would not be enough; but, as we shall see, the statement must very likely be confined to vessels. It was made with reference to Old Dominion S. S. Co. *v.* Virginia,[34] of which Mr. Justice White had just said:

> "In that case the vessels were enrolled in New York, the domicil of the owner, but, although engaged in interstate commerce, the vessels were navigating wholly within the limits of the state of Virginia, it was held that they came within the exception to the general rule which we have previously stated, and were properly taxable in Virginia." [35]

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[29] *Ibid.*, 525. [30] *Ibid.*

[31] (1885) 114 U. S. 196, 5 Sup. Ct. 826.

[32] (1906) 202 U. S. 409, 26 Sup. Ct. 679.

[33] *Ibid.*, 423.

[34] (1905) 198 U. S. 299, 25 Sup. Ct. 686.

[35] 202 U. S. 409, 422.

The property exempted in Kelley *v.* Rhoades [36] was a flock of sheep footing it through the State. The agreed state of facts stipulated that they were being driven through Wyoming on their way from Utah to Nebraska, that they were not brought into the State for the purpose of being maintained permanently therein, that they were maintained on the way by grazing, that the journey took from six to eight weeks, and that on the regular tax day the plaintiff had no property in Wyoming. The State court had held the sheep liable to taxation under a State statute imposing a tax on "all live stock brought into the State for the purpose of being grazed", and making it the duty of the collector to assess the tax as soon as the live stock entered the county. The owner in a suit to recover back the tax paid, relied on the commerce clause, and Mr. Justice Brown began his opinion by saying that "this case resolves itself into the single question whether the property of the plaintiff was engaged in interstate commerce to such an extent as to be exempt from taxation by the State of Wyoming, through which it was being transported." [37] The Supreme Court disagrees with the inference of the State court that the stock was brought into the State "for the purpose of being grazed." [38] The fact that the sheep may have gained flesh during the trip is said to be "impertinent, unless the primary purpose of their being driven there was for grazing." [39] The flock made nine miles a day and this was thought sufficient celerity to show that they did not dawdle unduly to graze. There is a hint that if it were established that the plaintiff intended to fatten his sheep on the way, this might make them

[36] (1903) 188 U. S. 1, 23 Sup. Ct. 259.

[37] *Ibid.*, 4.

[38] "The question to be determined, then, is whether the stock of the plaintiff was brought into the state *for the purpose of being grazed* at the time it was assessed for taxation. This question must be answered by the agreed statement of facts. While this statement is binding upon this court, as well as the state courts, different inferences may be drawn from these facts as to the applicability of the state statute. Had the state court found directly the ultimate fact that the sheep were brought into the state for the purpose of being grazed, such finding might have bound us, but, under the facts actually found or agreed upon, we are at liberty to inquire whether they support the judgment." (188 U. S. 1, 5.)

[39] *Ibid.*, 9.

taxable; but the court's admitted suspicion of such intention is put aside for want of anything in the agreed statement of facts to justify it.[40] The limitation of the general rule that "property actually in transit is exempt from local taxation" is recognized when it is said that "if it be stored for an indefinite time during such transit, at least for other than natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities." [41] Here, as in Coe *v.* Errol,[42] dispute as to the future plans of the travelers was foreclosed by the agreed state of facts. Proof, however, would have been possible, since the suit to recover back the tax was brought after the sheep had left the State, as is evident from the statement as to the time taken for their transit. This shows the advantage of this procedure over an injunction to restrain the collection of the tax while the property is in the control of the collector and before its future movements belong to the past.

Yet in a number of cases property concededly on its way to another jurisdiction is held taxable where it is at rest on tax day if it has stopped to enjoy some local facility not directly ancillary to its transit. Bacon *v.* Illinois [43] is the best illustration of this. Bacon bought grain on its way from the West and South through Chicago to New York and Philadelphia. The consignors' contracts with the carriers reserved the right to remove the grain at Chicago for the temporary purpose of

[40] "We do not deny that it may have been plaintiff's intention not only to graze, but to fatten, his sheep while *en route* through Wyoming. Indeed, we may suspect it, but there is nothing in the agreed statement of facts to justify that inference." (188 U. S. 1, 9.)

[41] 188 U. S. 1, 5. Later in the opinion Mr. Justice Brown again speaks of the indefiniteness of the delay as the determining element in the cases that have allowed the taxation of chattels unsuccessfully asserted to be in the course of interstate transit. At page 8 he says: "Bearing in mind that the weight of all the previous cases in this court has been laid upon the fact of an indefinite delay, awaiting transportation at the commencement of the journey, or awaiting sale or delivery at its termination, the facts of this case fail completely to bring it within those authorities." Note that the earlier cases referred to involved the jurisdiction, not of an intermediate State, but of the State of origin or of destination.

[42] Note 28, *supra.*

[43] (1913) 227 U. S. 504, 33 Sup. Ct. 299.

inspecting, weighing, cleaning, grading and mixing it. Bacon availed himself of this privilege and put the grain in his Chicago elevator for so long, and only for so long, as was necessary for these operations. He then sent it on East under the original contracts with the carriers. He never intended to sell any of it in Illinois. The facts were agreed upon in a suit to recover back the tax assessed in Chicago. In sustaining the tax, Mr. Justice Hughes said:

> "But neither the fact that the grain had come from outside the state, nor the intention of the owner to send it to another state, and there to dispose of it, can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported, and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell his grain in Illinois or forward it, as he saw fit. It was in his possession, with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination." [44]

This makes it clear enough that tax day is an expensive time for an owner of property to interrupt its transit for any purpose unconnected with that transit. He may, however, without extravagance stop it on tax day for a purpose in aid of

[44] *Ibid.*, 515-516. Consideration will be given later to an elaborate *dictum* in the case that if the grain was really in transit it would be exempt notwithstanding the fact that its owner was domiciled in Illinois.

transportation. If ships may safely pause to be refitted,[45] cars and engines may halt to be repaired. Yet anything of the nature of reconstruction would doubtless be held to break the transit.[46] If an owner may drive his sheep across the State, he may doubtless remove his stock from cars to give them the temporary relief from their cramped quarters that is not infrequently required by law. A delay due to an embargo would be like a delay due to low water. A stop to exhibit a circus would seem like a stop to grade and mix grain, yet it would be sensible for the court to make a difference.[47] The formula which

[45] Hays *v.* Pacific Mail S. S. Co., note 2, *supra.*

[46] Compare two cases on the question whether an employee of an interstate railroad was engaged in interstate commerce so as to be entitled to sue under the federal Employer's Liability Act. In one of the cases (New York, N. H. & H. R. Co. *v.* Walsh, No. 289, October Term, 1911) decided under Mondou *v.* New York, N. H. & H. R. Co. (Second Employers' Liability Cases) (1912), 223 U. S. 1, 32 Sup. Ct. 169, the employee held to come within the Act was injured while replacing a drawbar on a car then in use in interstate commerce. In Minneapolis & St. L. R. Co. *v.* Winters (1917), 242 U. S. 353, 37 Sup. Ct. 170, recovery under the Act was denied to a person injured while repairing an engine. Mr. Justice Holmes gives the facts and the conclusion as follows:

"The last time before the injury on which the engine was used was on October 18, when it pulled a freight train into Marshalltown, and it was used again on October 21, after the accident, to pull a freight train out from the same place. That is all that we have, and is not sufficient to bring the case under the act. This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted on an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of interstate commerce depended upon its employment at the time, not upon remote probabilities or upon accidental later events." (242 U. S. 353, 356-357.)

It is not to be assumed that the test of exemption from taxation under the commerce clause would be the same as the test adopted in applying the Employers' Liability Law. Ships might be treated differently from engines. The course of business might make clear that a ship would continue on interstate business as soon as repairs were over, as was not true in the case of the engine under consideration. Yet there is reason to believe that the court would find some repairs so extensive that the commerce clause afforded no exemption from taxation. Whether due process might shield where the commerce clause would not, is to be considered later.

[47] Professor Beale, in the article cited in note 1, *supra*, refers to Rob-

the court has adopted for the solution of such problems is sufficiently flexible to enable it to decide each case as it thinks best.

Obviously the transit is broken when goods are taken from the carrier and put in a warehouse where they are held for sale. Thus in American Steel & Wire Co. *v.* Speed [48] a New Jersey corporation had to pay a Tennessee tax on account of goods sent to Tennessee and put in a warehouse there for sorting and storage until ordered by customers who have previously made general contracts entitling them to have their orders filled. These general contracts left the customers an option as to the kind and quality of articles they would select. The fact that ninety per cent of the goods went to jobbers outside of Tennessee was held to be immaterial. The case involved an excise on merchants, but it was decided on the principle that the goods were no longer in transit. Here for the first time the court gave explicit consideration to the difference between a tax on goods from other States and one on goods from other countries. The latter, under the doctrine of Brown *v.* Maryland,[49] remain imports until sale or bulk broken. The former, under the doctrine of Woodruff *v.* Parham,[50] are not technically imports. The Constitution specifically forbids State taxes on imports and exports; but goods whose transit is across State, and not national, boundaries can rely only on more general provisions of the Constitution. The question under the commerce clause is not whether the goods are still articles of interstate

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inson *v.* Longley (1883), 18 Nev. 1, holding not taxable because still in transit a traveling circus "which came into a state to exhibit at one or two points within the state and then to proceed to another state." But in Southern Pacific Co. *v.* Arizona (1919), 249 U. S. 472, 39 Sup. Ct. 313, the train movements of a circus traveling between two points in the State were held intra-state and subject to the rate regulating power of the State commission, where transportation out of the State had not yet been contracted for. The court said that the mere intention to leave the State later did not convert the contemplated intra-state movement into one that was interstate.

[48] (1904) 192 U. S. 500, 24 Sup. Ct. 365.

[49] (1827) 12 Wheat. (25 U. S.) 419. The case held that a tax on the sale of goods of foreign origin still in the hands of the importers in the original package in which they arrived is a tax on imports. Low *v.* Austin (1872), 13 Wall. (80 U. S.) 29, holds that such goods may not be subjected to a general property tax.

[50] (1869) 8 Wall. (75 U. S.) 123.

commerce, but whether their subjection to taxation along with other property in the State affects interstate commerce sufficiently to be deemed a regulation thereof.[51] The reason why such goods from other States may be subjected to the State taxing power before they fall within the State police power is this. A State prohibition of the sale of goods from other States would restrain their introduction and thus directly burden interstate commerce. A State tax on such goods along with the goods of local origin has no serious influence on their introduction.[52]

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[51] The taxpayer's contention was declared to be based upon a misconception which was said to result "from assuming that the rule which governs in a case where there is an absolute prohibition is applicable where no such prohibition obtains." Continuing, Mr. Justice White declared:

"Thus, in Brown *v.* Maryland there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. Woodruff *v.* Parham and Brown *v.* Houston, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a state so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in Brown *v.* Maryland — that is, sale in the original packages at the point of destination—was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce." (192 U. S. 500, 521.)

[52] The police power cases relied on by the complainant were Leisy *v.* Hardin (1890), 135 U. S. 100, 10 Sup. Ct. 681, and Lyng *v.* Michigan (1890), 135 U. S. 161, 10 Sup. Ct. 725. The first held invalid a State prohibition of the sale of liquor when applied to sales of original packages from other States. The second held that a State could not impose on the business of making such sales an annual license fee of $300 from which domestic producers who paid the manufacturer's tax of $65 were exempt. Though the court mentions this discrimination, it does not appear specifically to rely on it in reaching its decision. In the Steel & Wire Case, Mr. Justice White says that these police power cases present the same question, in a different aspect, that is presented in the cases forbidding State taxes on imports. This, he elaborates as follows:

The Steel & Wire Case was followed in General Oil Co. *v.* Crain,[53] which permitted Tennessee to tax oil removed from the cars in which it came from other States and put into tanks from which it was later withdrawn and sent to other States. This, too, was not an *ad valorem* property tax; but the determining question was whether the transit was sufficiently interrupted to give the oil in the tanks a taxable *situs*. All the members of the court who passed on the question agreed that the oil put in a tank to await future orders was no longer journeying. But Justices Holmes and Moody took a different attitude towards another tank which contained only oil that had been sold for delivery outside of Tennessee before it started from Pennsylvania. Mr. Justice Moody insisted that the stop in Tennessee was no longer than what was necessary to repack and reship, and that such repacking and reshipping were required by the economical conduct of interstate commerce in commodities of this character. He thought it not important that the remainder of the interstate journey might begin under a new contract of shipment, and he regarded the oil as still in the course of interstate transportation when its halt was in aid of the best way of making the trip from place of origin to place of ultimate destination. For the majority Mr. Justice McKenna took the view that the oil was thus temporarily stored, "not in necessary delay or accommodation to the means of transportation . . . but for the business purposes and

"The goods had reached their destination and the question was not the power of the state to tax them, but its authority to treat the goods as not the subjects of interstate commerce, and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and therefore void. The cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation, and at a different period for the purposes of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of state authority considered in the respective cases." (192 U. S. 500, 522-523.)

[53] (1908) 209 U. S. 211, 28 Sup. Ct. 475. In this case Mr. Justice McKenna says that "the beginning and the ending of the transit which constitutes interstate commerce are easy to mark" but that "intermediate between these points questions may arise". (209 U. S. 211, 229-230.)

profit of the company." [54] His idea seemed to be that the halt was not so much in aid of the transportation as to gain an added advantage that the transportation itself would not yield. Mr. Justice Moody is clearly correct in thinking that the case goes farther than the Steel & Wire Case, for here these specific goods had already been sold to customers in other States and were on their way to them.

In the majority opinion Mr. Justice McKenna found support from an Illinois decision [55] which allowed Illinois to tax logs on their way down the river from Wisconsin to Iowa, where they were held at a point in Illinois until the Iowa mill was ready for them. He differentiated two New Jersey decisions [56] which exempted coal coming from Pennsylvania in cars and piled in New Jersey only so long as was necessary to get boats to send them on to other States. In the Illinois case the stop was for a business purpose distinct from the transportation. In the New Jersey cases the stop was required by the means of transportation chosen. Yet, of course, the coal might have been sent by rail all the way from Pennsylvania to its ultimate destination. The consignors chose the method of transportation which required the stop. In one of the cases, too, it appears that the coal was deposited on the New Jersey wharf "for separation and assortment". The case is not so different from the General Oil Case that it is certain that the Supreme Court would approve of it, even though it found it possible to distinguish it. Courts often edge away from precedents by first distinguishing them and later overruling them or declaring them overruled.

That the Supreme Court does not regard all deposits of coal taken from cars and awaiting shipment by boats as still in transit is established by Susquehanna Coal Co. *v.* South Amboy,[57] decided in 1912. Here a unanimous court allowed New Jersey to tax such coal. Chief weight was attached to the

[54] 209 U. S. 211, 230-231.

[55] Burlington Lumber Co. *v.* Willetts (1886), 118 Ill. 559, 9 N. E. 254.

[56] State, Detmold, Prosecutor *v.* Engle (1871), 34 N. J. L. 425; State, Lehigh & Wilkesbarre Coal Co., Prosecutors *v.* Carrigan (1876), 39 N. J. L. 35.

[57] (1912) 228 U. S. 665, 33 Sup. Ct. 712.

facts that the coal was shipped to New Jersey in advance of definite orders from other States and that the accumulation of a stock between the mine and the market enabled the dealers to fill orders more readily. If the case can be distinguished from the New Jersey cases considered by Mr. Justice Peckham in General Oil Co. *v.* Crain,[58] it must be because the storage was for longer than necessary to get boats, for in the New Jersey cases there is no hint that the coal was already sold to customers outside of New Jersey. In one of them coal was accumulated in New Jersey until it could be separated into different sizes and enough of one size obtained to make a cargo. Such a purpose seems so close to that for which the oil was stored in the General Oil Case that it seems likely that the New Jersey court was more tolerant towards advantageous breaks in transit than the Supreme Court would be. If there is a distinct halt in the transit which brings a gain that would otherwise not ensue, the Supreme Court frowns on efforts to escape local taxation. It regards the transit as uninterrupted, only where the stop is necessary in order effectively to go on. The exemption, when accorded, is not based on the ephemerality of the pause. Property only temporarily present is taxable provided it gains an advantage from what happens while it is at rest.

The issue whether the transit has been effectively broken necessarily shades into the issue whether the transit has terminated. It is perhaps altogether academic to divide the cases into those telling whether all transit is over and those telling whether a stop is such as to divide the transit into two independent journeys. Yet certain distinctions are possible. There are reasons why an intermediate State should have less power than the State of final destination, and cases may readily be imagined where it would take more proof to establish that a trip is broken than to settle that it is ended. As early as 1885, Brown *v.* Houston[59] settled that when property is offered for sale, its wanderings are regarded as over, quite irrespective of what possible purchasers may later plan to do with it. Louisiana was allowed to tax coal still in the barges in which it had

[58] Note 53, *supra.*

[59] (1885) 114 U. S. 622, 5 Sup. Ct. 1091.

recently come from Pennsylvania. No physical removal was deemed necessary to make it "a part of the general mass of property in the State".[60] It was called a commodity in the market of New Orleans which "might continue in that condition for a year or two years, or only for a day." [61] It was recognized that goods from abroad, still in the original package, and goods in transit are exempt, but the court could see no objection to taxing goods which had reached their destination and which were not technically imports.[62] Thus, without any specific consideration, the protection of the original package

[60] *Ibid.*, 634.

[61] *Ibid.*, 633-634.

[62] Mr. Justice Bradley's mode of reasoning was the rhetorical question. It did not seem to occur to him that the line between exemption and taxation might be drawn according to the original package rule as it is in dealing with imports. He appears to think that the only alternatives are between permanent exemption of goods from other States (as is required in the case of imports so long as they remain imports) and taxability of such goods immediately upon their arrival. At least he suggests no other alternatives when he says:

> "It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale. Take the City of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England, or from the pastures and grain fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there until used or sold, and constituting part of the great mass of its commerical capital—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States?" (114 U. S. 622, 633.)

A hint that possibly Congress might require the exemption of such goods as those here allowed to be taxed is contained in the paragraph:

> "When Congress shall see fit to make a regulation on the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State. In the present case we see no such conflict, either in the law itself or in the proceedings which have been had under it and sustained by the State tribunals, nor any conflict with the general rule that a State cannot pass a law which shall interfere with the unrestricted freedom of commerce between the States." (114 U. S. 622, 634.)

rule was denied to articles from sister States.[63]

Pittsburg & Southern Coal Co. *v.* Bates,[64] ten years later, goes a bit farther. Some of the coal here taxed was not at its final destination, but was a few miles up the river. It seemed to be thought sufficient that the property was within the jurisdiction in which it was offered for sale, even though it had not got to the market place. In both these cases the coal had been taxed for the same year in the State of its origin. In neither case was the coal moving on the day when the tax was levied. In one it had gone as far as the owner was going to take it, but in the other it had not. But the stop up stream seemed to be in the nature of storage, like that of the logs in the Illinois case. The opinion of the court pays no attention to any of the details of the situation, but contents itself with a review of the precedents, a presentation of generalities and a statement of the result. It would be interesting to know what would have happened if on tax day the coal had chanced to be loitering along the last lap of its journey without having indulged in any preliminary pause. The distinction between rest and motion seems a thin one for commodities in the jurisdiction of their final destination in containers which could not take them beyond the place of sale soon to be reached.

Two cases deal with the question when the transit begins. In Coe *v.* Errol[65] logs cut in New Hampshire had been drawn to the bank of a river and some of them had been put in the stream. The intention of the owner to send them down the

[63] See note 53, *supra*, for Mr. Justice White's consideration of the matter nearly twenty years later. In Brown *v.* Houston the contention that the tax was one on imports was found to be supported by no other facts than that after tax day some of the coal was sold to ocean going ships to be used in their bunkers. As the coal was held for sale in New Orleans, it was declared that it was not even intended for exportation, and that it did not matter that some of it might happen to be exported afterwards. Of another contention in the case Mr. Justice Bradley said: "We are certainly unable to see how, or in what respect, any equality of privileges as citizens has been denied to the plaintiffs by the imposition of the tax. Their property was only taxed like that of all other persons, whether citizens of Louisiana or of any other State or country. Not the slightest discrimination was made." (114 U. S. 622, 635.)

[64] (1895) 156 U. S. 577, 15 Sup. Ct. 415.

[65] (1886) 116 U. S. 517, 6 Sup. Ct. 575, note 28, *supra*.

river to Maine was held to confer no immunity from New Hampshire taxation. Mr. Justice Bradley declared that "such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey." [66] To this he added:

> "It is true, it was said in the case of The Daniel Ball, 10 Wall. 565: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from one State to another. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing." [67]

In Diamond Match Co. *v.* Ontonagon [68] these ideas were applied to hold taxable by the State of origin logs put into a stream and floated down to a point where they were held while awaiting taking out for shipment by rail to other States as the demands in those States justified. The contention that the logs were in continuous interstate transit from the time when

[66] *Ibid.*, 527.
[67] *Ibid.*, 528.
[68] (1903) 188 U. S. 82, 23 Sup. Ct. 266.

they were first put in the river was said to be "more extreme than that made and rejected in Coe *v.* Errol".[69] The decision that the logs were taxable was not predicated upon the fact that they were at rest. They were not in fact in the town which taxed them. The Michigan statute was framed to reach logs in transit and provided that logs in transit to a point without the State should be assessed at the place within the State nearest to the last boom or sorting place in which they will naturally last be floated. Mr. Justice McKenna remarked that "the cases establish that there may be an interior movement of property which does not constitute interstate commerce, though property come from or be destined to another State." [70] Of property from another State he said that "though it have not reached its place of debarkation or delivery, it may be taxed." [71] For this he cited Brown *v.* Houston [72] evidently by mistake for Pittsburgh & Southern Coal Co. *v.* Bates,[73] for he had earlier said of the coal in the Bates Case that it "had not reached, as the coal in Brown *v.* Houston, its exact destination." [74] Of property destined to another State, he said that "until it be shipped or started on its final journey it may be taxed",[75] citing Coe *v.* Errol.[76]

From this it appears that transit alone does not deprive the State of origin or the State of destination of jurisdiction to tax. To be effective for this purpose the transit must be interstate transit. Therefore any exemption due merely to transit must be the gift of the commerce clause and not of the Fourteenth Amendment. This naturally raises the question whether the case is any different with property temporarily in an intermediate jurisdiction. Has the Supreme Court abandoned its earlier idea that temporary presence cannot create the *situs* requisite to jurisdiction to tax? Does it now accord exemption only when the property can claim protection under the commerce clause because in the course of actual interstate transit or of some stop necessarily incidental to such transit? The cases certainly have a pronounced squint in this direction. Unless

[69] *Ibid.*, 97.
[70] *Ibid.*, 96.
[71] *Ibid.*
[72] Note 59, *supra.*
[73] Note 64, *supra.*
[74] 188 U. S. 82, 93.
[75] *Ibid.*, 96.
[76] Note 65, *supra.*

this squint can be corrected, we must concede that the exemption of things in transit or only temporarily present is not a mandate of the doctrine of extraterritoriality or due to any requisite of *situs*. If the law under consideration is nothing but an interpretation of the commerce clause, its refinements belong to the peculiar province of the student of constitutional law and are outside the bailiwick of the student of conflict of laws. The latter may be allowed the privilege of proclaiming that temporary presence is sufficient for *situs* and jurisdiction to tax. He may add the warning that taxation not bad for the vice of extraterritoriality may still be void as a regulation of interstate commerce; but if he begins to inquire what does or does not regulate interstate commerce he is neglecting his own proprietary interest and generously aiding that of his neighbor who is concerned with constitutional law.

This is not to imply that the two fields are wholly distinct. In so far as taxability or immunity depends upon a conception of *situs*, the question belongs both to constitutional law and to conflict of laws. For the courts in annulling legislation for the vice of extraterritoriality are making their views of the proper principles of conflict of laws the determining factor in their conception of due process of law. The Supreme Court as the authoritative interpreter of the Fourteenth Amendment may compel State courts and legislatures to accept its discoveries of the principles of conflict of laws whenever those discoveries require the State to stay its hand. The State courts, however, as the final arbiters of the requirements of the due process guaranteed by the State constitutions, may forbid what the Supreme Court permits. They may confer an exemption on account of temporary presence when the Supreme Court would not. They may not, where the Fourteenth Amendment is properly pleaded, take a broader view of *situs* than that of the Supreme Court. But they may take a narrower view whenever they are applying the due-process clause of a State constitution. They may adopt as a practical test for applying their conception of *situs* the practical test which the Supreme Court uses to determine whether a State is regulating interstate commerce. Thus the State courts, instead of saying that tempo-

rary presence never gives jurisdiction to tax, may say that it is sufficient to create *situs* if the presence is for a purpose disconnected from transportation, but not if the presence is a mere incident of transportation. Thus they may make conflict-of-laws law out of the same practical distinctions that the Supreme Court may be using exclusively for interstate-commerce law.

This sally into scholasticism is intended for something more than an intellectual frolic. It may help to bring into clearer relief the issue as to what the Supreme Court has really been doing in the cases we have been considering. It has been saying clearly enough that the commerce clause does not confer immunity on property unless it is in actual course of interstate transit, construing transit broadly enough to include stops necessarily incident thereto. In addition to this, it may have been assuming that property physically present on tax day has no other ground of exemption than that which it may urge under the commerce clause. This is to say that it may have been assuming that physical presence, however evanescent, necessarily confers *situs*. Or, secondly, it may have been applying the commerce clause in the light of its conception of *situs*, as it plainly was in the early days when it began exempting property in transit. It may think that the acquisition of *situs* depends upon the purpose of a visit rather than upon its duration. Thus it may be giving us its ideas of the proper principles of conflict of laws even though it is technically confining itself to an interpretation of the commerce clause.[77] A third possibility

[77] To one with the commerce clause to rely on, the second hypothesis is no more consoling than the first. It would profit him nothing to be allowed to go to the Supreme Court with a due-process objection to taxation of property present only on tax day, if the mantle of due process covers no more than that of the commerce clause. But to property which has no relation to interstate commerce and can therefore make no claim under the commerce clause, the second hypothesis may offer some relief that the first would not. Such property would prefer a test of *situs* that looks beyond the mere fact of its presence to the reason why it was there. There would always be some chance of finding a new excuse for its presence which might be accepted as enough to prevent the acquisition of *situs*.

The theoretical or schematic distinction between the two hypotheses is this. Under the first, the Supreme Court's conflict-of-laws rule is that

is this. The Supreme Court may not have been thinking in terms of *situs* at all. It may not have been inquiring whether the State had general jurisdiction to tax property present but momentarily. It was not required to make any such inquiry unless the complainant relied on the Fourteenth Amendment. Strange as it may seem, the Fourteenth Amendment was not made the basis of any of the claims to exemption thus far considered. Hence it is possible that the taxpayers' defeats under the commerce clause might have been turned into victories under the Fourteenth Amendment.

In passing judgment on the relative strength of these three possible inferences from the cases that have allowed the taxation of grain and oil and coal and logs and hardware during a brief visit, we need such help as we can get from other Supreme Court decisions which further illustrate the relation between the commerce clause and the *situs* of chattels. We shall see that, if the difficulties as to the acquisition of *situs* can be surmounted, the commerce clause does not exempt chattels in continuous interstate transit. We shall find, also, not a little support for the contention that the Supreme Court would recognize a due-process objection to the taxation of brief visitors even where concededly the visit is not a mere incident to interstate transit. This will lead us to conclude that exemptions under the commerce clause are influenced to a considerable, if not to a controlling, extent by conceptions of extraterritoriality. It will give us a basis on which to contend that a tax for a year on what is present only for a day may deny due process of law even where it does not regulate interstate commerce.

[*To be continued.*]

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mere presence confers *situs*. Its consideration of the object of the presence is for the purpose of seeing whether the commerce clause confers exemption where the due-process clause does not. Under the second hypothesis, the purpose of the visit enters into the Supreme Court's conflict-of-laws conception of jurisdiction to tax, and the cases technically decided under the commerce clause are not part of the private preserve of the student of constitutional law, but belong to the "common because of vicinage" on which the student of constitutional law and the student of conflict of laws may rightfully graze side by side.